

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNDER ARMOUR, INC.,

Plaintiff

v.

BODY ARMOR NUTRITION, LLC,

Defendant

**CIVIL No. JKB-12-1283
[UNDER SEAL]**

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MEMORANDUM

Under Armour, Inc. (“Plaintiff”) brought this suit against Body Armor Nutrition, LLC (“Defendant”) for trademark infringement, trademark dilution, unfair competition, cybersquatting, and cancellation of trademark registration. Now pending before the Court are Defendant’s motion for partial summary judgment (ECF No. 57), Plaintiff’s motion for partial summary judgment (ECF No. 61), Plaintiff’s motion to compel and for sanctions (ECF No. 82), and the parties’ motions to seal various documents (ECF Nos. 59, 65, 69, 74, 78, 86, 89, 92). The issues have been briefed and no hearing is required. Local Rule 105.6. For the reasons set forth below, Defendant’s motion for partial summary judgment will be DENIED, Plaintiff’s motion for partial summary judgment will be DENIED, Plaintiff’s motion to compel and for sanctions will be GRANTED IN PART and DENIED IN PART, and the parties’ various motions to seal documents will be DENIED WITHOUT PREJUDICE.

I. BACKGROUND

Plaintiff is a Maryland corporation and is “one of the world’s most successful, popular, and well-known providers of performance apparel, footwear, accessories, and sporting goods.” (Second Am. Compl. (“SAC”) ¶¶ 2, 8; ECF No. 67.) Plaintiff alleges that it began using and promoting the UNDER ARMOUR mark in connection with its apparel products in 1996. (*Id.* ¶ 9.) In addition, Plaintiff has applied for and received numerous federal registrations of UNDER ARMOUR and other related marks, including its interlocking logo, in connection with various products. (*See id.* ¶ 47.) “Since at least as early as 2004, [Plaintiff] has used and promoted the tagline mark PROTECT THIS HOUSE in connection with its products.” (*Id.* ¶ 45.) Plaintiff alleges that it “began offering bottled water” as early as March 2005. (*Id.* ¶ 12.) Plaintiff also alleges that it owns pending applications for the UNDER ARMOUR mark and its logo for, among other beverage products, “carbonated waters; drinking water; drinking water with vitamins; energy drinks; flavored bottled water; fruit beverages; fruit drinks; fruit juices; herbal juices; isotonic beverages; isotonic drinks; smoothies; sports drinks.” (*Id.* ¶ 16.)

Plaintiff alleges that it “has sold billions of dollars worth of products under the UNDER ARMOUR name/mark” and related marks. (*Id.* ¶ 26.) “In 2011 alone, [Plaintiff] sold more than \$1.4 billion worth of products.” (*Id.*) In addition, Plaintiff alleges that “[f]or many years, [Plaintiff] has spent tens of millions of dollars annually advertising, marketing, and promoting its ARMOUR marks.” (*Id.* ¶ 30.) “Since 2009, [Plaintiff] has spent over \$100 million annually on marketing and promotional activities.” (*Id.*)

Defendant is a Delaware limited liability company that makes and sells sports beverages, including “BODYARMOR SUPERDRINK, a line of nutrient-enhanced juice beverages.” (SAC ¶ 3; Def. Summ. J. Br. at 3, ECF No. 57.) According to Defendant, the idea for this product

“was conceived in 2006” by the father of Defendant’s CEO after he watched movies in which characters wore body armor. (*Id.*) In 2007, a company associated with the father of Defendant’s CEO “filed an intent-to-use application for the trademark BODY ARMOR with the United States Patent and Trademark Office.” (*Id.* at 4.) In 2010, the domain name WWW.DRINKBODYARMOR.COM was registered on behalf of Defendant, which now operates the website to promote its product. (*Id.*)

On April 26, 2012, Plaintiff filed this suit, alleging that Defendant’s mark, logo and “Protect + Restore” tagline infringe on Plaintiff’s trademark rights. On May 15, 2013, Defendant moved for summary judgment on Plaintiff’s federal trademark dilution and cybersquatting claims. On the same day, Plaintiff moved for summary judgment on its trademark infringement and unfair competition claims. Plaintiff has also filed a motion to compel, and both parties have filed motions to seal various documents.

II. LEGAL STANDARD

A party seeking summary judgment must show “that there is no genuine dispute as to any material fact” and that he is “entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). If a party carries this burden, then the court will award summary judgment unless the opposing party can identify specific facts, beyond the allegations or denials in the pleadings, that show a genuine issue for trial. FED. R. CIV. P. 56(e)(2). To carry these respective burdens, each party must support its assertions by citing specific evidence from the record. FED. R. CIV. P. 56(c)(1)(A). The court will assess the merits of the motion, and any responses, viewing all facts and reasonable inferences in the light most favorable to the opposing party. *Scott v. Harris*, 550 U.S. 372, 378 (2007); *Iko v. Shreve*, 535 F.3d 225, 230 (4th Cir. 2008).

III. ANALYSIS

A. Plaintiff's Motion for Partial Summary Judgment

Plaintiff moves for summary judgment in its favor in connection with its trademark infringement and unfair competition claims under federal and common law (Counts I, II, V, VII). The parties agree that the tests for all of these claims are the same. To prevail on these claims, Plaintiff must establish: (1) ownership of a valid, protectable trademark; and (2) a likelihood of confusion among consumers caused by Defendant's use of its marks. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 930 (4th Cir. 1995). Plaintiff has not met its burden of establishing that there is no genuine issue of material fact as to the likelihood of confusion caused by Defendant's use of its marks.

In this circuit, the relevant inquiry is whether Defendant's use of Plaintiff's marks is likely to cause confusion or mistake, or to deceive an ordinary consumer "as to the source or sponsorship of the goods." *Lone Star*, 43 F.3d at 933 (citing *Anheuser-Busch, Inc. v. L. & L. Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992)) (internal quotation marks omitted). The Fourth Circuit has identified nine non-exhaustive, non-mandatory factors "that may be relevant in determining the ultimate statutory question of likelihood of confusion": "(1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public." *George & Co. LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 393 (4th Cir. 2009) (citing *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984)). The likelihood of confusion is an issue that is

“particularly amenable to resolution by a jury.” *Anheuser-Busch*, 962 F.3d at 318. Not only is a jury likely to represent “a cross-section of consumers,” but also “the likelihood of confusion is an inherently factual issue that depends on the unique facts and circumstances of each case.” *Id.* (internal citations and quotation marks omitted).

Although the parties’ submissions diligently address each of the above factors, it is not necessary for the Court to do so. *Anheuser-Busch*, 962 F.2d at 320 (the *Pizzeria Uno* factors are not a rigid formula). The factors fall into two categories, which correspond with two interrelated issues that underlie the likelihood of confusion analysis: (1) how similar are the parties’ marks, in light of the strength of Plaintiff’s marks; and (2) how similar are the parties’ products, in light of the ways that those products are presented to consumers. Through that lens, the parties’ submissions demonstrate that Plaintiff has not met its burden of establishing there is no genuine issue of material fact as to the likelihood of confusion.

Boiled down to its essence, Plaintiff’s theory addresses both of these underlying concerns: Plaintiff argues that Defendant “not only mimicked three of [Plaintiff’s] valuable trademarks, but displayed all three of them together on one product that goes hand in hand with sports apparel and equipment, thereby ensuring a connection and confusion with” Plaintiff. (Pl. Summ. J. Br. at 27, ECF No. 62.) Plaintiff argues that it “owns and extensively uses” valid and protectable rights in “UNDER ARMOUR, ARMOUR, and [its] family of ARMOUR-formulative marks.” (*Id.* at 3, 20 (capitalization in original).) Plaintiff further argues that the BODY ARMOR mark is similar to all three of these claimed marks. (*Id.* at 25.) For these reasons, Plaintiff argues, the BODY ARMOR mark is likely to “be perceived as a natural extension of Plaintiff’s family.” *Id.* Plaintiff also argues that Defendant’s logo is similar to

Plaintiff's logo; Plaintiff describes both as "interlocking logos."¹ Plaintiff argues that the alleged similarities between the logos "exacerbate the similarity between UNDER ARMOUR and BODY ARMOR." (*Id.* at 26.) Finally, Plaintiff argues that "[Defendant's] tag-line 'Protect + Restore' resembles [Plaintiff's] famous tag-line 'Protect This House,' further enhancing the likelihood of confusion."

Defendant responds that the mutual use of a single word (armor/armour) is not sufficient to establish similarity. Defendant emphasizes that its packaging increases the dissimilarity of the products by using a different font, spelling the word "armor" without the "u," and utilizing bright colors and pictures of fruit. Defendant disputes that its logo is "interlocking," and characterizes it as a "stickman figure – an outline of a human body with a shield for a 'head.'" It also describes its "Protect + Restore" slogan as a "descriptive phrase." The effect of these visual similarities and dissimilarities are inherently subjective, and are best left to a jury absent additional conclusive evidence.²

In an attempt to meet its burden, Plaintiff presents evidence that consumers have actually been confused about the source or sponsorship of Defendant's products. Plaintiff relies on testimony from Andrew Lloyd, one of Defendant's "field marketing brand ambassadors," who

¹ Images of both logos are available in the parties' briefs.

² Defendant also argues that Plaintiff's marks are weak and deserve limited protection. The Fourth Circuit has described the strength or distinctiveness of the plaintiff's marks as the "paramount factor" in determining likelihood of confusion. *Pizzeria Uno*, 747 F.2d at 1527. Plaintiff has presented adequate evidence that it has strong marks. Defendant argues that the UNDER ARMOUR mark is merely a descriptive mark, which are considered weak and receive narrow legal protection. *See Pizzeria Uno*, 747 F.2d at 1527 (explaining the four levels of strength and distinctiveness of marks). The distinction between descriptive and suggestive marks is difficult to draw and is frequently made on an intuitive basis. *Id.* at 1528. However, even if the Court agreed with Defendant that UNDER ARMOUR was merely a descriptive mark, the parties' submissions leave no doubt that it is "commercially strong." *See Synergistic Int'l, LLC v. Korman*, 470 F.3d 162, 174 (4th Cir. 2006) (explaining the importance of commercial strength). Plaintiff submitted affidavit evidence outlining its marketing and sales efforts. (*See, e.g.*, ECF No. 91 at 5-6 (summarizing affidavit evidence).) Defendant's proffered evidence that there are "currently over 860 non-UA federal registrations and over 1,150 non-UA applications for registrations of marks containing the word armor/armour, including 31 registrations in the apparel field alone" is also insufficient to demonstrate the weakness of Plaintiff's marks without evidence of use.

testified that out of the “100 to 150 people” he speaks with in a day, two or three ask if Defendant is affiliated with Plaintiff. (Pl. Summ. J. Br. 13.) Plaintiff also points to testimony from Dustin McDonald, an area marketing manager, who testified that he has had to explain that Defendant is not affiliated with Plaintiff. (*Id.* at 14.) Plaintiff catalogues several additional examples of alleged confusion among consumers. However, Defendant argues that Plaintiff has mischaracterized the context and meaning of these examples. Defendant also offers testimony from its employees that contradicts the testimony offered by Plaintiff, and it presents a variety of reasons that the context of other evidence makes it less than probative of the issue of actual confusion. Finally, Defendant offers survey evidence that “less than 2% of respondents expressed a mistaken belief that [Defendant’s product] is made or sponsored by or affiliated with” Plaintiff. (Def. Br. in Opp’n to Pl.’s Mot. For Summ. J. at 24, ECF No. 72.) The determination of the credibility of the competing testimony, the best interpretation of the various “inquiries” about the connection between the parties’ products, and the importance of Defendant’s survey evidence is best left to a jury.³

Without unnecessarily belaboring the point, the parties have offered conflicting evidence about the similarity of the parties’ products, in light of the ways that those products are presented to consumers. As with the issues above, the parties frame the issues in fundamentally different ways. Plaintiff describes Defendant’s products as “sports-themed [and] sports-marketed.” (Pl.

³ Plaintiff also has not identified sufficient evidence to establish that there is no issue of material fact with respect to Defendant’s bad faith. The parties offer conflicting theories as to the origin of Defendant’s marks and their creators’ intentions. Plaintiff cites an email in which one of Defendant’s co-founders directed Defendant’s bottle designer to Plaintiff’s website “for reference purposes and observation” because he liked their font. (Pl. Summ. J. Br. at 33-34.) Plaintiff also cites two emails in which people appear to have warned Defendant about potential confusion with Plaintiff’s mark. (*Id.* at 35.) However, Defendant has offered sufficient evidence of its more benign origin story—that Defendant’s co-founder’s father thought of Defendant’s mark after watching violent movies—to raise an issue of fact. (*See* Def. Br. in Opp’n to Pl.’s Mot. For Summ. J. at 3.) In addition, Defendant has provided images of its various proposed bottle designs, and these images give some credibility to its evidence that Defendant’s logo is intended to represent a stickman figure and not to imitate Plaintiff’s logo. (*Id.* at 4.)

Summ. J. Br. at 28.) Plaintiff argues that these types of sports-themed drinks are often sold in sporting goods stores, at sporting events, and by means of celebrity endorsements from pro athletes. Defendant, on the other hand, characterizes its product as “a nutrient enhanced beverage,” which Defendant contrasts with Plaintiff’s “wearable” sports apparel.⁴ Defendant presents evidence that its products are sold primarily by natural foods, convenience, drug and grocery retailers across the country. (*See* Def. Br. in Opp’n to Pl.’s Mot. For Summ. J. at 14.) Neither of the parties’ characterizations of the products and their presentation to consumers is inaccurate, and the job of determining which characterization is best supported by the evidence is best left to a jury.

B. Defendant’s Motion for Partial Summary Judgment

a. Plaintiff’s Federal Dilution Claim (Count III)

Defendant seeks summary judgment on Plaintiff’s federal trademark dilution claim. First, Defendant argues that the federal dilution claim is barred by the Trademark Dilution Revision Act (“TDRA”). The statute creates the federal registration defense, which operates as “a complete bar” to certain claims against a person who owns a valid federal trademark registration. 15 U.S.C. § 1125(c)(6). Prior to October 5, 2012, the statute did not limit the use of this defense to state law claims. Plaintiff argues that the applicability of this defense to federal dilution claims is the result of a congressional drafting error, and Defendant “does not dispute that the pre-October 2012 language . . . was the result of a drafting error.” (Def. Reply Br. at 3, ECF No. 87.) However, Congress subsequently corrected the error and, in doing so, directed that the amendment to the statute applies “to any action commenced on or after” October 5, 2012. Amendment—Trademark Act of 1946, Pub. L. No. 112-190, § 1(a), 126 Stat. 1436 (Oct. 5,

⁴ Defendant also presents evidence that Plaintiff has expressed a complete lack of interest in expanding into the sale of beverages, which contrasts with the evidence offered by Plaintiff. As above, resolving this conflicting evidence is best left to a jury.

2012). If Congress had not corrected its error, then the Court would be inclined to find that the aberration was the result of scrivener's error and should be disregarded in order to give effect to Congress's intent. However, the corrected language was the only change that Congress made with that particular bill, and Congress's failure to direct that the amendment have retroactive effect suggests that Congress intended for the corrected language to apply only prospectively. If the Court ignored this provision, it would be ignoring Congress's instruction on how to address Congress's error. Therefore, the federal registration defense is applicable to federal dilution claims.

Despite the above analysis, the federal registration defense may not be available to Defendant. Plaintiff amended the complaint to add claims for cancellation of Defendant's registration. Summary judgment on the basis of a federal registration defense is not appropriate in such a situation. *See Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 635 n.4 (9th Cir. 2008). In *Jada Toys*, the Ninth Circuit held that the federal registration defense would not bar *state law* unfair competition claims if the federal registration were cancelled. The same logic applies in this case; if Plaintiff succeeds in cancelling Defendant's registration, then that cancelled registration cannot act as a bar to any claim. Therefore, the Court will not grant summary judgment in favor of Defendant on the basis of the federal registration defense.

The elements of a federal dilution claim are: (1) that Plaintiff owns a famous mark that is distinctive; (2) that Defendant has commenced using a mark in commerce that allegedly is diluting the famous mark; (3) that a similarity between Defendant's mark and the famous mark gives rise to an association between the marks; and (4) that the association is likely to impair the distinctiveness of the famous mark or likely to harm the reputation of the famous mark. *Louis*

Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 264-65 (4th Cir. 2007). Defendant argues that Plaintiff has failed to offer evidence to support the first and third elements.

Unlike more traditional trademark infringement law, the trademark dilution claim is not motivated by an interest in protecting consumers from confusion; instead, dilution is intended to protect “the ability of [a] famous mark to clearly identify and distinguish only one source.” *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 167 (4th Cir. 2012). Because of the expansive protection offered by dilution claims, Congress limited federal claims for trademark dilution to marks that are “famous.” See 15 U.S.C. § 1125(c)(1). “[A] mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” *Id.* § 1125(c)(2)(A). “In determining whether a mark possesses the requisite degree of recognition, the [C]ourt may consider all relevant factors,” including: (i) the duration, extent, and geographic reach of advertising and publicity of the mark; (ii) the amount, volume, and geographic extent of sales of goods or services offered under the mark; (iii) the extent of actual recognition of the mark; and (iv) whether the mark was registered. *Id.* § 1125(c)(2)(A)(i)-(iv). “This is not an easy standard to achieve.” *Rosetta Stone*, 676 F.3d at 171.

Defendant argues that the Court should grant summary judgment in its favor because surveys commissioned by Plaintiff in 2010 and 2011 found, among other things, that “aided brand awareness of the Under Armour brand [was only] 68%,” which was lower than three other sports apparel companies. Defendant urges this Court to adopt a minimum threshold of 75% brand awareness among the general public in order to establish that a mark is famous. Such a threshold has been promoted by certain commentators and adopted by some district courts. However, the Court does not find the arguments for a 75% requirement to be persuasive because

they are contrary to the statute, which directs courts to consider “all relevant factors.” A brightline requirement of 75% recognition is inconsistent with such a balancing process. It is possible—although this Court need not address the issue—that 75% recognition would be sufficient to establish that a mark is “famous” within the meaning of § 1125. However, even where a litigant can demonstrate that a mark has not reached that threshold, that proof is not sufficient to demonstrate that a mark is not famous. Plaintiff has offered evidence of extensive marketing efforts and billions of dollars in revenues. (*See, e.g.*, Pl. Reply Br. at 5-6, ECF No. 91.) Such evidence is sufficient to raise an issue of material fact on the issue of fame.

Defendant also argues that there is no evidence that its mark gives rise to an actionable level of association with Plaintiff’s mark. Although this inquiry is distinct from the likelihood of confusion issue discussed above, a good deal of the parties’ evidence will be relevant to both issues. For many of the reasons discussed above, Defendant has failed to establish that there is no genuine issue of material fact on this element.

b. Plaintiff’s Cybersquatting Claim (Count IV)

Defendant moves the Court to grant summary judgment in its favor on Plaintiff’s federal cybersquatting claim. The elements of a cybersquatting claim under the Anticybersquatting Consumer Protection Act (“ACPA”) are: (1) registration, use, or trafficking in a domain name; (2) that is identical or confusingly similar to Plaintiff’s distinctive mark or dilutive of its famous mark; (3) with a bad faith intent to profit from Plaintiff’s mark. 15 U.S.C. § 1125(d)(1)(A). Defendant argues that there is no genuine issue of material fact as to the second and third elements.

Defendant has failed to establish that there is no genuine dispute of material fact as to the second element. One way to establish that element is to demonstrate that, without regard to the

goods or services of the parties, Defendant’s domain name is “identical or confusingly similar to or dilutive of” a mark “that is famous at the time of the registration of the domain name.” 15 U.S.C. § 1125(d)(1)(ii)(II). For the reasons set out more fully above, Defendant has failed to establish that Plaintiff’s mark is not a famous mark or that, if it is famous, Defendant’s domain name is not dilutive of it. A reasonable jury could conclude that Plaintiff’s mark is famous and that the DRINKBODYARMOR.COM domain name is dilutive of that famous mark.⁵ Therefore, Defendant has failed to establish that there is no genuine issue of material fact in connection with the second element of Plaintiff’s cybersquatting claim.

Defendant has also failed to establish that there is no genuine issue of material fact as to the third element of Plaintiff’s cybersquatting claim. The statute identifies nine factors that the court may consider in evaluating whether a person had bad faith intent, including “the person’s intent to divert customers from the mark owner’s online location to a site accessible under the domain name that could harm the good will represented by the mark . . . by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site.” 15 U.S.C. § 1125(d)(1)(B)(v). As the Court addressed in footnote 3, *supra*, the parties have presented evidence supporting competing theories of the origin of Defendant’s marks. Plaintiff has offered adequate evidence for a reasonable jury to conclude that Defendant chose both its mark and its domain name in an effort to profit from Plaintiff’s mark. Therefore, the Court will not grant summary judgment in favor of Defendant on Plaintiff’s cybersquatting claim.

C. Plaintiff’s Motion to Compel and for Sanctions

Plaintiff moves for sanctions or to compel further discovery because it alleges that Defendant failed to investigate, collect, preserve, and produce evidence of actual confusion over

⁵ If the Court were wrong that the dilution claim should survive, then, for purposes of deciding the summary judgment motion, the Court would hold that a reasonable jury could conclude that the DRINKBODYARMOR.COM domain name is confusingly similar—as that term is defined in the ACPA—to Plaintiff’s mark.

the connection between Plaintiff and Defendant's product. Plaintiff identifies two ways in which it alleges that Defendant did not meet its obligations during the discovery process.

First, Plaintiff served on Defendant interrogatories addressing actual confusion. In one, Plaintiff asked Defendant to describe "all instances of confusion or mistake between the parties, their Marks and/or their products." In another, Plaintiff asked Defendant to describe "in detail all inquiries/comments that Defendant has received referring or relating to [Plaintiff]." Plaintiff alleges that Defendant did not make any efforts "to investigate, collect, preserve, and produce actual confusion evidence." Second, Plaintiff deposed Defendant's CEO, Lance Collins, as a Rule 30(b)(6) designee on the topic of confusion. Mr. Collins testified that Defendant had not instituted any procedures or "done anything in a systematic way" to track instances of actual confusion. Mr. Collins also testified that he did not take any steps as the Rule 30(b)(6) designee to prepare to testify about Defendant's knowledge of instances of actual confusion.

To address these alleged failings, Plaintiff asks the Court to find that actual confusion has occurred, to instruct the jury that Plaintiff has established actual confusion, and to order Defendant not to deny or dispute actual confusion. In the alternative, Defendant asks that the Court compel Defendant "to interview all current and past employees . . . reasonably likely to have information" concerning actual confusion, provide sworn responses from those employees, and take additional steps.

Defendant had no obligation to create a reporting mechanism or other system to track oral inquiries from consumers about any affiliation between the parties. However, Defendant had an obligation to make reasonable inquiries and disclose all information known to it in response to Plaintiff's interrogatories. In addition, as the Rule 30(b)(6) designee, Mr. Collins had an obligation to determine what Defendant knew about the topics for which he was designated to

testify. Based on Mr. Collins testimony, it does not appear that he met his obligation. However, Plaintiff has not alleged that documentary or tangible evidence has been destroyed or lost as a result of this lapse. Therefore, the Court will deny Plaintiff's motion for sanctions and grant Plaintiff's motion to compel. The Court will order Defendant to provide to Plaintiff within 30 days a full response to the following question:

Describe all information known to Defendant or available to it through reasonable inquiries suggesting that consumers have actually been confused or inquired about the source or sponsorship of Defendant's products.

D. Parties' Motions to Seal Various Documents

The parties have filed motions to seal various documents in connection with their competing motions for summary judgment. They have moved to seal their summary judgment briefs and attachments (ECF Nos. 59, 65, 74, 78, 89, 92) and their submissions in connection with Plaintiff's motion to compel and for sanctions (ECF No. 86). In addition, the Court has previously granted Plaintiff's motion to seal the second amended complaint (ECF No. 69).

There is a "presumption of access accorded to judicial records." *Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). In the Fourth Circuit, "a First Amendment right of access attaches to documents filed in connection with a summary judgment motion" in civil cases. *ACLU v. Holder*, 652 F. Supp. 2d 654, 661 (E.D.V.A. 2009) (citing *Rushford*, 846 F.2d at 253). However, "there may be instances in which discovery materials should be kept under seal even after they are made part of a dispositive motion." *Rushford*, 846 F.2d at 253. Under the First Amendment, a "denial of access must be necessitated by a compelling government interest and narrowly tailored to serve that interest." *Id.* (citing multiple cases). The party seeking to prevent access to judicial documents filed in connection with a summary judgment motion has the burden of

establishing “that the denial [of access] serves an important governmental interest and that there is no less restrictive way to serve that governmental interest.” *Id.*

In determining whether the materials at issue should be sealed, the Court must follow the following procedure: (1) give the public adequate notice that the sealing of documents may be ordered; (2) provide interested persons an opportunity to object to the requests before the Court makes its decision; (3) if the Court decides to seal documents, it must state its reasons on the record, supported by specific findings; and (4) state its reasons for rejecting less restrictive alternatives. *Rushford*, 846 F.2d at 253-54 (citing *In re Knight Publ’g Co.*, 743 F.2d 231 (4th Cir. 1984)).

In order to satisfy the first requirement, the Court must “give the public adequate notice that the . . . sealing of documents may be ordered,” and the motion must be docketed reasonably in advance of its disposition “so as to give the public and press an opportunity to intervene and present their objections to the court.” *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986). As required by Local Rule 105.11, the Court has allowed more than 14 days to elapse after the motions were entered on the public docket to permit the filing of objections by interested parties; in fact, more than two months have passed since the most recent motion to seal was filed. Therefore, the Court has given the public adequate notice that it may order the sealing of its memorandum and opinion.

The Court has also satisfied the second requirement. The Court has given the parties time to submit responses to the various motions, and they have not. No members of the public or press intervened or otherwise indicated opposition to the motions, but the Court would have allowed any such parties to present arguments in opposition. The third and fourth requirements only apply if the Court decides to seal the submissions.

The parties have provided only the barest support for the motions to seal, usually relying on the protective order issued in this case.⁶ For example, the most recent motion to seal (ECF No. 92) states: “Plaintiff’s Reply papers contain confidential and highly confidential information protected from public disclosure pursuant to the terms of the Stipulated Protective order that, if publicly disclosed, would be detrimental to the parties’ business interests.” In order to meet their *Rushford* burden, the parties must “explicitly identify information akin to trade secrets, and describe how its release will result in an unfair commercial advantage.” *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 123 (D. Md. 2009). The parties must provide “specific factual representations” to justify their arguments. *See id.* at 123-24; *see also* Local Rule 105.11. The parties must establish “that the denial [of access to these records] serves an important governmental interest and that there is no less restrictive way to serve that governmental interest.” *See Rushford*, 846 F.2d at 253. For that reason, the Court will deny the various motions to seal (ECF Nos. 65, 74, 78, 86, 89, 92).⁷

There are valid reasons for parties to move to keep certain information sealed. It is possible that some of those justifications are implicated by this case, and the Court does not want to unseal information that should rightly be kept from public disclosure. Therefore, the Court’s denial of the motion to seal will be without prejudice. In addition, the Court will stay its order to

⁶ Protective orders that limit the disclosure of pretrial discovery materials can be appropriate because such discovery is “ordinarily conducted in private.” *Rushford*, 846 F.2d at 252. However, once the documents “are made part of a dispositive motion, such as a summary judgment motion, they lose their status of being raw fruits of discovery.” *Id.* (internal quotation marks omitted).

⁷ The Court will also vacate its marginal orders (ECF Nos. 79, 80) granting Defendant’s motion to seal its summary judgment motion (ECF No. 59) and Plaintiff’s motion to seal the second amended complaint (ECF No. 69). The Court did not comply with the *Rushford* procedure or Local Rule 105.11 when it granted these motions; specifically, the Court failed to wait 14 days before ruling on these motions and failed to state on the record its reasons for granting the motions. For that reason, the Court must now reconsider these motions, and the motions are inadequate. Specifically, the Court’s review of the redline version of the second amended complaints reveals that very little information was added that was not in the first amended complaint (ECF No. 35), which was not filed under seal. There is no compelling governmental interest in protecting information that is already public, and Plaintiff has not provided adequate justification for sealing the new information.

unseal these documents for 30 days to allow the parties time to re-file these motions. This memorandum includes information from the documents implicated by the motions to seal, so the Court will also temporarily seal this memorandum and the accompanying order for the same period, to be unsealed 30 days after the date of their issue unless the Court upon motion enters a further sealing order.

IV. CONCLUSION

Accordingly, an order shall issue DENYING Defendant's motion for partial summary judgment (ECF No. 57), DENYING Plaintiff's motion for partial summary judgment (ECF No. 61), GRANTING IN PART and DENYING IN PART Plaintiff's motion to compel and for sanctions (ECF No. 82), DENYING the parties' motions to seal various documents (ECF Nos. 59, 65, 69, 74, 78, 86, 89, 92), temporarily sealing the filings at issue in the parties' motions to seal (ECF Nos. 57, 62, 63, 64, 67, 68, 71, 72, 76, 83, 84, 85, 87, 91) for 30 days, and temporarily sealing this memorandum and order for 30 days.

Dated this 23rd day of August, 2013

BY THE COURT:

/s/
James K. Bredar
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNDER ARMOUR, INC.,

Plaintiff

v.

BODY ARMOR NUTRITION, LLC,

Defendant

**CIVIL No. JKB-12-1283
[UNDER SEAL]**

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ORDER

In accordance with the foregoing memorandum, it is ORDERED that:

- (1) Defendant's motion for partial summary judgment (ECF No. 57) is DENIED;
- (2) Plaintiff's motion for partial summary judgment (ECF No. 61) is DENIED;
- (3) Plaintiff's motion to compel and for sanctions (ECF No. 82) will be GRANTED IN PART and DENIED IN PART;
- (4) Defendant is ORDERED to provide to Plaintiff information as specified in the foregoing memorandum;
- (5) The Court's order granting Defendant's motion to seal its summary judgment filings (ECF No. 79) and the Court's order granting Plaintiff's motion to seal the second amended complaint (ECF No. 80) are VACATED;
- (6) The parties' motions to seal various documents (ECF Nos. 59, 65, 69, 74, 78, 86, 89, 92) are DENIED WITHOUT PREJUDICE;
- (7) This memorandum and order are TEMPORARILY SEALED;

- (8) The filings at issue in the parties' motions to seal (ECF Nos. 57, 62, 63, 64, 67, 68, 71, 72, 76, 83, 84, 85, 87, 91) are TEMPORARILY SEALED; and
- (9) This memorandum and order and the filings at issue in the parties' motions to seal shall be unsealed 30 days from the date of this order's issue unless the Court upon motion enters a further sealing order.

Dated this 23rd day of August, 2013

BY THE COURT:

/s/
James K. Bredar
United States District Judge